

Presidential Elements in Government

The Czech Republic

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History of the Czech presidency – Constitutional status of the President – Personal powers and powers subject to countersignature by the Premier – Presidency of V. Havel and V. Klaus – Emerging constitutional conventions – Appointment of judges – Resignation of Ministers and Appointment of Premier – Legislative veto – Moderation of the constitutional system rather than implementation of a political programme – Importance of the political context – Parliamentarianism with a relatively influential President.

The Czech Republic emerged from the collapse of Czechoslovakia on 1 January 1993. Unlike Slovakia, it follows the traditions of Czechoslovak statehood, which is openly recognized in the Preamble of the Czech Constitution.¹ The Czechoslovak 1920 Constitution influenced its constitutional text² to a substantial degree

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¹ The Preamble, Czech Const., reads, *inter alia*, 'We the citizens of the Czech Republic ... Faithful to all good traditions of ... Czechoslovak statehood ...' The English translation of the Constitution is available at the website of the Czech Constitutional Court, <www.concourt.cz>. The authors of this article have used this text.

² E. Stein, 'Out of the Ashes of a Federation. Two New Constitutions', 45 *American Journal of Comparative Law* (1997) p. 45. The article provides a wonderful English introduction into the drafting the Czech Constitution by a renowned American scholar of Czech origin who spent much of 1992 in what was then Czechoslovakia. See for more details E. Stein, *Czecho/Slovakia. Ethnic Conflict. Constitutional Fissure. Negotiated Breakup* (Ann Arbor, UM Press 1997) (hereinafter 'Stein, *Czecho/Slovakia*').

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and the Czech system of government follows the traditional concept of parliamentarianism of the First Czechoslovak Republic (1918-1938).

Firstly, this article will provide a short history of the Czech presidency with 1918 as a point of departure. Over a period of ninety years, a Czech perception of the presidency has developed which has not been disturbed by forty years of communism. The history of and rationale behind the Czech presidency as well as the charisma of the presidential office have exerted a profound influence on the current concept of the Czech presidency. The second and key part of the article describes the general issues relating to the constitutional status of the President. It contains a brief history of the drafting of the Czech Constitution and it explains why the drafters have opted for the indirect election of the President. Subsequently the powers of the President are discussed, with on the one hand the personal powers exercised by the president in the absence of governmental approval and on the other hand, those powers which are subject to countersignature by the Premier. Finally, a plethora of examples, mostly from the Presidency of Klaus, illustrate the expansion of the role of the President in the Czech constitutional system. Our conclusion will be that many specifics of the Czech constitutional system relate to the fact that this constitutional system, less than two decades after the fall of Communism, is still unstable and tends to be modified by emerging constitutional conventions made by charismatic figures in political and constitutional life.

THE HISTORICAL ROOTS OF THE CZECHOSLOVAK PRESIDENCY

Czechoslovakia emerged from the break-up of the old Austro-Hungarian Empire in 1918. Since the foundation of the country, the Presidential office has always enjoyed high prestige throughout the nation. The most decisive reason for this was the personality of Tomáš Garrigue Masaryk, its first President (1918-1935). Masaryk, formerly leader of political emigrants in the course of World War I, contributed significantly to the establishment of an independent Czechoslovakia. As a result of his authority, the Presidential powers in the Constitution of 1920 were relatively substantial, despite the fact that he was not directly elected. Moreover, Masaryk exercised considerable informal influence as he was closely allied with certain political figures and parties (often called the 'Castle faction', referring to the seat of Czech Kings and later Presidents). The weight of President Masaryk's personality made any frontal conflict with him impossible for politicians throughout the whole spectrum of the so-called state-founding political parties.³

³ On Masaryk see in English R.B. Pynsent (ed.), *T.G. Masaryk (1850-1937)* (Basingstoke, Hampshire, Macmillan 1989).

Edvard Beneš, the second President (1935-1948), was Masaryk's close colleague for many years and a leader of the government in exile in London during the Nazi occupation and World War II. Neither Masaryk, Beneš, nor Emil Hácha, the President of the curtailed Czecho-Slovakia after the Munich Agreement of 1938, had any direct link to political parties. This emphasized the position of the President as a neutral political figure, standing above daily party politics. This concept of presidential neutrality was also influenced by the similar role that the Habsburg Emperors, above all Franz Joseph I, had exercised in the Austro-Hungarian Empire.

The Czech tradition of perceiving the President as a personification of the state, often typical of monarchies, helped to preserve the Presidential office even under Communist rule. While the post of President had been abolished in the majority of Central European communist countries, the highest representatives of the Czechoslovak Communist Party liked to enjoy the privilege of this office. Therefore, the offices of Secretary-General of the Czechoslovak Communist Party and of President of the Republic were often combined.

The second name we must keep in mind if we want to understand the peculiar Czech concept of the Presidency is Václav Havel (President of Czechoslovakia from 1989-1992, and of the Czech Republic from 1993-2003). Havel's powers cannot be explained by the mere reference to the constitution that was in force during the initial period of his Czechoslovak Presidency. Especially in the first months after his election by the Czechoslovak Federal Assembly, in late December 1989, Havel 'ruled' rather than 'reigned' Czechoslovakia. The weight of the personality of the hero of 'one of the unlikeliest political fairy tales of recent times',⁴ the dissident who had fought the dictatorship until he ultimately won,⁵ his popu-

⁴ P.S. Green, 'Farewell for "Good Czech Who Sacrificed Himself"', *NY Times*, 3 Feb. 2003, Section A, p. 8.

⁵ Best described in Havel's speech in the U.S. Congress, 21 Feb. 1990: 'The last time they arrested me, on October 27 of last year, I didn't know whether it was for two days or two years. Exactly one month later, when rock musician Michael Kocáb told me that I would probably be proposed as a Presidential candidate, I thought it was one of his usual jokes. On the 10th of December 1989, when my actor friend Jiri Bartoska, in the name of the Civic Forum, nominated me as a candidate for the office of the President of the republic, I thought it was out of the question that the Parliament we had inherited from the previous regime would elect me. Twelve days later, when I was unanimously elected President of my country, I had no idea that in two months I would be speaking in front of this famous and powerful assembly, and that I would be heard by millions of people who have never heard of me and that hundreds of politicians and political scientists would study every word I say. When they arrested me on October 27, I was living in a country ruled by the most conservative Communist government in Europe, and our society slumbered beneath the pall of a totalitarian system. Today, less than four months later, I am speaking to you as the representative of a country which has complete freedom of speech, which is preparing for free elections, and which seeks to establish a prosperous market economy and its own foreign policy. It is all very extraordi-

larity and the extraordinary respect he received from abroad contributed to the image and status of the Presidential office in Czechoslovakia and after that of the newly established Czech Republic.⁶

THE CONSTITUTIONAL POWERS OF THE PRESIDENT

Election and general issues

The Constitution of the Czech Republic, enacted on 16 December 1992, two weeks before the dissolution of the Czechoslovak Federation, was drafted to relieve the urgent need of the Czech Republic to have its own constitution by 1 January 1993. The Constitution was prepared within several months and, unfortunately, there are few records explaining the history of its drafting.⁷

The political scene of the early 1990's Czech Republic was controlled by Václav Klaus, later a Czech Premier (1992-1997), who envisaged a rather weak Presidency, bearing in mind that the natural candidate for this function was Havel. The latter was a private citizen in late 1992, because he had resigned from the post of Czechoslovak President in protest against the gradual dissolution of the Czechoslovak Federation instigated by two leading politicians: Klaus and Mečiar (a Slovak Premier). Havel was, however, able to influence, though in a limited way, the final version of the Constitution.⁸ Repeatedly, he emphasized that his acceptance of the offer to stand in the Presidential election would be subject to the President having 'a certain authority'.⁹

The Presidential term of office is set at five years and no President can be elected more than twice in succession.¹⁰ In compliance with the tradition of the parliamentary form of government in Czechoslovakia, and despite some objections by Havel,¹¹ the President of the Czech Republic is elected indirectly¹² by a

nary indeed.' English translation as available at <www.vaclavhavel.cz> (all papers at <www.vaclavhavel.cz> visited 19 May 2006).

⁶ In this context, P. Kopecký mentions the unsuccessful attempt to institutionalise Havel's charisma. See P. Kopecký, *Parliaments in the Czech and Slovak Republics. Party Competition and Parliamentary Institutionalization* (Ashgate, Aldershot 2001) p. 213.

⁷ In English see Stein, *Czecho/Slovakia*, *supra* n. 2, p. 282-297.

⁸ Stein, *supra* n. 2, p. 60-61; Stein, *Czecho/Slovakia*, *supra* n. 2, p. 288.

⁹ The proclamation of V. Havel on his Presidential nomination of 16 Nov. 1992, available in Czech at <www.vaclavhavel.cz>.

¹⁰ See Art. 55 and Art. 57(2) Czech Const.

¹¹ Stein, *supra* n. 2, p. 60-61 and Stein, *Czecho/Slovakia*, *supra* n. 2, p. 288. V. Havel remained consistent in this approach and repeated his preference for direct election of the President many times. See, e.g., the article from the end of his Presidency, V. Havel, 'Jak volit mého nástupce? Přímo!' [How to elect my successor? Directly!], *MF DNES*, 30 Jan. 2002, available at <www.vaclavhavel.cz>.

¹² Art. 54(2) Czech Const.

bicameral¹³ Parliament.¹⁴ The drafters of the Constitution were aware of the fact that generally the election of the President by parliament restricts autocratic tendencies and contributes to the 'moral leadership' of the Head of State.¹⁵ In this respect the debates of the drafters of the German Basic Act guided the drafters of the Czech Constitution.¹⁶

In the first two rounds, the chambers vote independently, which effectively means that a successful candidate must be elected by each chamber; in the first round a majority of all deputies and a majority of all senators is required, in the second round the majority of present deputies and present senators. However, if a President is not elected in the first two rounds, the votes of members of both chambers are added up in the third round; this enables the more numerous Chamber of Deputies (200 members) to outvote the senators (81),¹⁷ as was the case in 2003 when V. Klaus was elected in the third round, where a majority of the votes of all parliamentarians is sufficient (Article 58(7) Czech Constitution).

Although the Constitution of the Czech Republic reflects the standard division of powers, it does not adhere to the traditional tri-partite separation of powers principles. Whereas it aims at structuring three branches, it places some of the bodies outside of the classical legislature-executive-judiciary framework. The Constitution only partly adheres to a residual delimitation of executive power, according to which all state bodies that are not part of either the legislature or the judiciary should fall within the scope of executive branch.¹⁸

Although the Public Prosecutor's Office is part of the executive branch according to Chapter III of the Constitution on the executive power, the role of the Supreme Audit Office and the Czech National Bank are described in individual titles, thereby excluding them from the executive branch. However, the Constitu-

¹³ In this way, the President differs from the government, which depends for its existence on the confidence of the Lower House of the Parliament and has only limited relations to the Senate. Cf. Stein, *Czecho/Slovakia*, *supra* n. 2, p. 288 (in note 69 quoting Havel who emphasized that the election by both chambers adds 'a certain different character to the political position of the President').

¹⁴ K. von Beyme thinks that a President elected by parliament represents the weakest form of the modern Head of State. As opposed to monarchies, he is not even the 'dignified part' of government. See K. von Beyme, *Die Parlamentarische Demokratie. Entstehung und Funktionsweise 1789–1999*, 3rd edn. (Wiesbaden 1999) p. 317.

¹⁵ M. Ameller, *Parliaments. A Comparative Study on the Structure and Functioning of Representative Institutions in Fifty-Five Countries*, 2nd edn. (London, 1966) p. 267.

¹⁶ See, e.g., D.P. Conradt, *The German Polity* 6th edn. (White Plains, Longman 1996) p. 182–183.

¹⁷ See Art. 58 Czech Const.

¹⁸ D. Hendrych, *Správní věda. Teorie veřejné správy* [Administrative Science. Theory of Public Administration], (Praha, ASPI 2003) p. 14 et seq. The original author of this concept was O. Mayer, an important German scholar of the 19th century.

tion does not dedicate a special title to the President and thus does not view its role of the Head of State as a *pouvoir neutre* above social and political divisions within society.¹⁹ In the current constitutional system, the President remains part of the executive branch despite the fact that Presidential links with the government are not necessarily more intense than those with Parliament.

The constitutional powers of the President

The powers of the President and those of the government, the second component of the executive power, are drawn up complementarily: everything that falls outside the competence of the President, as specified in the Constitution and other laws, falls within the competence of the government as ‘the supreme body of executive power’ (Article 67(1) Czech Constitution). Nevertheless, in parliamentary monarchies and to a lesser extent also in parliamentary republics, the government influences the exercise of powers of the usually non-responsible Head of State by countersigning his acts or decisions (the appointment of the Premier is usually the main exception). The Czech Constitution, however, comprises a relatively broad list of personal powers, i.e., powers that can be exercised without the requirement of a countersignature.²⁰

The President a) appoints and recalls the Premier and the other members of the government and accepts their resignation, recalls the government and accepts its resignation, b) convenes sessions of the Chamber of Deputies, c) dissolves the Chamber of Deputies (*see*, however, below), d) authorizes the continued provisional performance of the government, the resignation of which he has accepted or which he has recalled, until a new government is appointed, e) appoints justices of the Constitutional Court, its chief justice and the deputy chief justices, f) appoints from among the justices of the Supreme Court the chief justice and the deputy chief justices of the Supreme Court, g) pardons and mitigates penalties

¹⁹ Cf. on the concept of *pouvoir neutre*, e.g., J.J. Sheehan, *German History, 1770-1866* (Clarendon, Oxford University Press 1989) p. 430-433 (analyzing Hegel’s Philosophy of Rights); A. Sajó, *Limiting Government. An Introduction to Constitutionalism* (Budapest, CEU Press 1999) p. 177.

²⁰ *See* Art. 62 and Art. 63 Czech Constitution. Professor Filip links this with the Presidential roles of arbitrator and moderator, J. Filip, *Vybrané kapitoly ke studiu ústavního práva* [Selected Chapters on Constitutional Law] (Brno, Masarykova univerzita 2001) p. 312. Professor Pavlíček explains that this concept is a result of combining parts of the 1920 Constitution (which required the countersigning of ‘government and executive’ acts of the non-responsible President) with parts of the Socialist Constitution of 1960 (the communist Presidents were responsible to the National Assembly and therefore were allowed to exercise their powers without a countersignature); V. Pavlíček, ‘Teoretická koncepce Ústavy ČR (Několik úvah k 10. výročí jejího přijetí)’ [Theoretical Concept of the Constitution of the Czech republic – Several Considerations on the Occasion of the 10th Anniversary of Its Adoption], in J. Kysela (ed.), *Deset let Ústavy České republiky: východiska, stav, perspektivy* [Ten Years of the Czech Constitution: Fundamentals, Present, Perspectives] (Praha, Eurolex Bohemia 2003) p. 86-87.

imposed by a court, orders that criminal proceedings should not be initiated and, if already initiated, should be suspended, and that sentences should be expunged, h) has the right to return to the Chamber of Deputies of Parliament an adopted bill with the exception of constitutional bills (suspensive veto), i) signs adopted bills, j) appoints the president and the vice president of the Supreme Audit Office and k) appoints members of the Bank Board of the Czech National Bank without the countersignature of the Premier or any other minister.²¹

Whereas the enumeration of personal powers is exhaustive, the Constitution gives a non-exhaustive list of shared Presidential powers, i.e., those powers the exercise of which does require a countersignature. They are the power to a) represent the state with respect to other countries, b) negotiate and ratify international treaties (the first may be delegated to the government or, with its consent, to its individual members),²² c) act as the supreme commander of the armed forces, d) receive the heads of diplomatic missions, e) appoint and recall the heads of diplomatic missions, f) call elections to the Chamber of Deputies and the Senate, g) appoint and promote generals, h) award and bestow state decorations unless the President authorizes a different body to do so, i) appoint ordinary judges and j) grant amnesty.²³ Ordinary laws can expand this category: the appointment of university professors is the typical example of shared power granted to the President by ordinary law.²⁴ The government is responsible to Parliament for the exercise of the President's shared powers.

With regard to some of the shared powers, the countersignature requirement is very difficult to implement fully in practice. For instance, the power to represent the state with respect to other countries might be interpreted to call for the Premier's interference in and his/her preliminary approval of all major Presidential speeches in the area of foreign policy (although speeches are not decisions). However, this provision has never been read in this way and already President Havel achieved a substantial autonomy in the field of foreign relations. With some exceptions, such as his relations with the Dalai Lama,²⁵ Havel's views on foreign policy did not differ significantly from those of the governments between 1993 and 2003. We will show below that this flexible interpretation of the exercise of some of the shared powers becomes a real problem when the President has very different views on foreign policy from the government, the body which is responsible for it.²⁶

²¹ Art. 62 Czech Const. (the letters correspond to the paragraphs of Art. 62).

²² This has happened by the President's decision published in *Official Gazette* as 144/1993. Now a new decision relating to EU treaties is being prepared.

²³ Art. 63(1) Czech Const.

²⁴ See Art. 73 the act 111/1998 Sb. [*Official Gazette*].

²⁵ Cf. in English the information provided by the Czech Radio <www.radio.cz/en/article/36022> (visited 30 May 2006).

²⁶ See the text accompanying nn. 48-52 *infra*.

The exercise of some personal powers is conditioned by the requirement of approval or action of another body: the appointment of justices of the Constitutional Court is subject to the consent of the Senate, the appointment of the President and Vice-President of the Highest Audit Office is subject to approval by the Chamber of Deputies. Sometimes, the exercise of personal power is restricted by rigid conditions of application. The President may only dissolve the Lower House (the Chamber of Deputies) under strict conditions which rarely materialize.²⁷ The President only has complete discretion when it comes to the appointment of the Premier, the vetoing of laws and the appointment of the Bank Board of the Czech National Bank.²⁸

There are no explicit limitations imposed on the President as far as the appointment of the Premier is concerned (the other members of the government are appointed by the President on suggestion of the Premier).²⁹ However, a government able to receive a vote of confidence from the Chamber of Deputies must be constituted. The President therefore in practice appoints the person considered to be most capable of forming an acceptable government, which is not necessarily a representative of the most powerful political party. As a 'safety' measure against the wilful appointment of a Premier unable to gain the vote of confidence, with the aim to precipitate a political crisis and call new elections, the President's right to nominate a Premier is limited to two attempts. If also the second Premier cannot form a government able to win the confidence of the Chamber, the chairman of the Chamber of Deputies selects a nominee. As the majority of deputies elect this chairman of the Chamber of Deputies, he/she represents the majority of the Chamber.³⁰

The rather unusual absence of the requirement of the countersignature transformed the legislative veto³¹ into a personal prerogative of the President which is

²⁷ Art. 35(1) Czech Const.: the President shall dissolve the Lower House if (a) the Lower House does not adopt a resolution of confidence in a newly appointed government, despite the fact that all the possibilities to appoint the Premier are exhausted; (b) the Lower House fails, within three months, to reach decision on a governmental bill with the consideration of which the government has joined the issue of confidence; (c) a session of the Lower House has been adjourned for a longer period than is permissible; (d) for a period of more than three months, the Lower House has not formed a quorum, even though its session has not been adjourned and it has, during this period, been repeatedly summoned to a meeting. In fact, facing these strict conditions, it is very difficult to call for the early elections in the Czech Republic. There have been some proposals to extend the conditions to dissolve the Chamber of Deputies but (by the end of 2006) none has been successful.

²⁸ Pavlíček, *supra* n. 20, p. 87. As a result of the absence of any responsibility, Pavlíček considers all these powers to be autocratic. In his opinion, the President of the former Czechoslovak Federation was more powerful than the President of the First Czechoslovak Republic because in a parliamentary republic the role of the Head of State is assessed not on the basis of the scope of his powers, but on the constitutional and political responsibility.

²⁹ Art. 62(a) Czech Const.

³⁰ Art. 68(4) Czech Const. In the history of the Czech Republic this has never happened.

³¹ Art. 62(h) Czech Const.

used regardless of the wishes and interests of the government (unlike, for example, under the 1920 Czechoslovak Constitution). The reason behind the absence of the requirement of the countersignature is not very clear, but seems partly the result of the views of then citizen Havel in late 1992.³² The legislative veto has become the most effective tool for the President to carry through legal and political ideas, in particular in case of a minority government or a government with a narrow majority (to overrule a veto a majority of all members of the Chamber of Deputies is needed).³³

Finally, the appointment of the important Bank Board of the central bank³⁴ without the co-action of any other body may be considered a deviation from the system of ‘*checks and balances*’, because it makes the President’s role as guarantor of the bank’s independence solely dependant on self-restraint.

Overlooking the catalogue of Presidential powers, we see that the Czech President is stronger than monarchs and most Presidents in parliamentary systems (exemplified by Germany, Slovakia or Hungary) but simultaneously weaker than the heads of state in most semi-presidential systems (France) or systems close to semi-presidentialism (e.g., Poland³⁵). The effect of the Presidential powers as envisaged by the Czech Constitution is corrective. This seems to be one of the features of a moderate presidency, which is in line with the fact that the President, elected and legitimated by Parliament, is not responsible to Parliament. Therefore he/she should not be the creator of an independent, distinctive political programme of state reform, social transformation, etc. This would jeopardise his position as a politically uncontrollable representative of the country as a whole. Havel understood this. As President, Havel did not instigate particular political solutions, but rather guaranteed their legitimacy, as a guardian of certain principles and a certain political culture.³⁶

If, however, the President is perceived as an important (political) decision-maker, he/she can considerably complicate the functioning of the government by refraining from taking action. If the President delays appointing a new Premier,

³² See Stein, *supra* n. 2, p. 61 (in note 79 quoting Havel’s article from 18 November 1992, where the former Czechoslovak and soon-to-be Czech President claimed that without such a right the President ‘would be cut off from the legislative process’. (in Czech original see *Lidove Noviny*, 18 Nov. 1992, p. 3). The same text can be found in Stein, *Czech/Slovakia*, *supra* n. 2, p. 289, note 74.

³³ See also the text accompanying nn. 65-67 *infra*.

³⁴ Art. 62(k) Czech Const.

³⁵ Cf. on Poland, *inter alia*, L.L. Garlicki, ‘The Presidency in the New Polish Constitution’, 6 *East European Constitutional Review* (1997) available also at <www.law.nyu.edu/eecr/vol6num2>, visited 20 May 2006; M. Wyrzykowski & A. Cieleń, ‘Poland: Semi-presidentialism or ‘Rationalised Parliamentarianism’?’, 2 *EuConst* (2006) p. 253.

³⁶ R.L. Maddex, *Constitutions of the World* (London, Routledge 1995) p. 60.

ceases to negotiate and ratify international treaties, stops appointing ambassadors and judges, refuses to call elections, etc., then it is no longer the President who bargains with the government about the content of the decision to be countersigned, but the government who bargains with the President about the decision itself. We will show below that this is exactly what has happened during the first three years of Klaus' Presidency.

Variables influencing the eventual character of government

The basic structure of government in the Czech Republic is defined by the Constitution itself. The Constitution, however, is a rather short and general text that contains only major principles, providing substantial leeway to its interpreters. Therefore, the relations between constitutional bodies can vary from time to time. The key variables in this respect are the number and influence of the relevant political parties. They are mirrored, in particular, in the composition of both chambers of Parliament, their congruence or incongruence, the amount of confidence of the Chamber of Deputies in the government (majority, minority, coalition), the relation of the President to the majority of both chambers of Parliament and to the government and the relationship between the government and regional governments. Other variables have a less systemic character and concern the level of activity of individual constitutional bodies: the Senate rejecting or returning bills approved by the Chamber of Deputies, the Constitutional Court supervising the constitutionality of laws, as well as the co-operation of the President with the government or with political groups in Parliament. Here, the role of the President is what interests us most.

Traditionally the charisma of the office of the Czech Presidency inspires loyalty.³⁷ The President's seat is located in the Royal Castle, the President has a personal standard and military guards, on special occasions the President's arrival is accompanied by the fanfare from the opera 'Libuše', composed by Smetana in the 19th century as the fanfare for the mythical princess and founder of Prague. Portraits of the President decorate classrooms as well as rooms of administrative buildings (not unlike those of Imperial predecessors), generations of unsatisfied citizens appealed to him to seek remedy for legal injuries (even though the President can provide no such remedy) or the use of the President's generously defined right of pardon in criminal cases, etc. The President is rarely criticised in public, even though before the election he was as intensely engaged in domestic politics as the current President Klaus because he is no longer part of the everyday political disputes. If the President is invited to a discussion programme on television or

³⁷ A. Heywood, *Political Ideologies: An Introduction* 3rd edn. (Palgrave Macmillan 2004) p. 328.

radio, there are no opponents; there is only a polite moderator. Since 1989 the office itself guarantees that its holder occupies the first place in popularity polls.³⁸ All this makes it very difficult for a Premier to face an assertive President who tries to expand his/her constitutional domain.

The President is expected to behave in a non-partisan manner, i.e., to avoid discussing controversial political topics in public. It does however not mean avoiding politics, but rather its cultivation by means of round tables or personal talks (except perhaps during periods of serious political disturbances, when the President's role might be more active even). The President's role is supposed to consist of representing and uniting the nation as a whole, moderating conflicts when necessary and for the rest to devote attention to timely topics. Candidates should be selected with this established model in mind.

The independent Czech Republic has had two Presidents with very different personalities: Havel (1993-2003) and Klaus (since 2003).

The Presidency of Havel

Václav Havel was the revolutionary leader of a broad civic movement (Civic Forum – Občanské fórum), but in the second half of 1990 the movement's orientation and his ideas started to diverge. Václav Klaus, who was also to be its long-term Chairman, founded the right-wing Civic Democratic Party (CDP), the majority successor of the Civic Forum. In contrast, Havel who was sceptical towards political parties, never openly declared his support for any political party, and never tried to found one. Just as his pre-Communist predecessors, Havel constantly emphasized that he stood above party politics. Instead, he supported certain principles and, in particular, personalities,³⁹ which were usually advocated by or member of smaller centre or centre-right parties. Nevertheless, the camp of supporters of Havel's ideas and acts was fragmented and covered, in different periods and with varied intensity, nearly the whole spectrum of political parties.

Although the powers of the Presidency were visibly weakened by the new Czech Constitution of 1993, Havel was able to defend his domain against the government, including, for example, the human rights aspects of foreign policy (e.g., his contacts with the Dalai Lama despite the initial disapproval of the government, which feared the Chinese reaction) because of the enormous prestige *any* Czech President enjoys in combination with Havel's personality. He also gained the ad-

³⁸ For instance, in March 2006 the work of President Klaus was approved by 70% citizens, the government by less than 50% and the legislature by less than 40%. See <www.stem.cz/clanek/1066>, visited 1 May 2006.

³⁹ His relationship to the political parties and his support to the civic society brought President Havel closer to Federal President R. von Weizsäcker.

vantage – usually typical of monarchies – of cumulated experience and personal contacts with a number of foreign statesmen through his long-term involvement in high politics. Thus it is possible to agree with Eric Stein that Havel ‘breathe[d] life’ into the office of presidency ‘by capitalizing on the precedent of the “monarchical presidency” of Masaryk and on his own broad popularity.’⁴⁰

The degree of Havel’s interference with politics depended on the stability of the ruling coalition and the government in power. His role was rather limited during the first strong and coherent government under Premier Klaus (1993–1996). Subsequently, his role gradually increased during the second minority government under Klaus (1996–1997), peaking in 1997 and 1998, when he was one of the major architects of the short-term ‘technical’ government which was formed after the resignation of Premier Klaus in November 1997 and the ensuing political crisis. Havel was a critic of the power-sharing agreement between the ruling Social Democrats and the opposition party CDP led by Klaus in the period from 1998 to 2002, when the Social Democrats formed a minority government with the support of the CDP while granting substantial informal power to the CDP at the same time (Zeman government 1998–2002). The system based on the co-operation of the two most powerful parties was widely criticized as corrupt and dangerous to democracy. President Havel finally reestablished good terms with the government under the new Premier Špidla of the Social Democrats after 2002.

The Presidency of Klaus

While Havel had no direct party political affiliation, Klaus entered the Presidential office in 2003 as the honourable chairman of the opposition party CDP and as a key figure of the Czech conservatives. In the first half of the 1990s he propagated the ideas of Von Hayek regarding a free society, later he became critical of them. In sharp contrast to Havel, he joined the conservative critique of intellectuals as holders of the ‘right to the truth’, non-governmental organisations, the concept of civil society, ‘universality’ of ‘human’ rights (Klaus prefers the concept of ‘citizens’ rights), etc.⁴¹ Klaus’ party affiliation helped him to win the presidency after Havel’s two terms expired. At the beginning of 2003, his CDP acted as an election machinery, securing votes for him even outside its ranks. The disunity of the ruling coalition finally brought him victory in the ninth election round on 28 February 2003.⁴²

⁴⁰ Stein, *supra* n. 2, p. 63; Stein, *Czechoslovakia*, *supra* n. 2, p. 290.

⁴¹ For some of his opinions in English, see his personal website <www.klaus.cz>.

⁴² The Social Democratic Party, the strongest governmental party, demonstrated the greatest incongruence. One party faction wanted their former chairman M. Zeman to ‘rule the Castle’,

It must be emphasized that despite all of the differences in their background, both Presidents *reject the purely ceremonial type of presidency*. As we have shown above, this consensus pervades the Czech and Czechoslovak tradition. In fact, the concepts of the Presidency Havel and Klaus, as repeatedly presented by both men, did not differ dramatically. During the election process, Klaus rhetorically accepted the non-partisan attributes of the Presidential office by promising extensive consultations in the exercise of his powers, by showing his reservation to the exercise of the right of pardon, so often criticised by journalists, and to the right to veto bills.⁴³

Still, there are significant differences of style between both Presidencies. While Havel was a moral leader whose practical interventions in the political life of the country generally took place outside the spotlight,⁴⁴ Klaus presents himself as a practical politician, with at least the silent support of the CDP.⁴⁵ Instead of relying on moral appeals, he uses his powers as tools to force the other institutions, in particular the government, to negotiate. President Klaus also perceives *all* Presidential powers, including the shared ones, as personal and emphasises that they are exercised (or not exercised) on the basis of his will alone. Although the Czech Presidency remains within the parameters of the parliamentary model, the powers of the Czech President have definitely been strengthened during the first three years of Klaus' mandate, as the following examples will show.

It is no coincidence that the current President uses the originally French term 'cohabitation' to explain the power sharing between a President and a government with a different political colour. Klaus used this term, for instance, in his President's address on the National Holiday Day of 28 October 2003: 'Nowadays we experience the political situation which is called cohabitation, in our case the co-exist-

while another tried to prevent his election. This vote division made it impossible for the ruling coalition to unite behind any of its candidates, thereby increasing the chances of Klaus, the candidate of the opposition.

⁴³ See the speeches of 15 Jan. 2003, 24 Jan. 2003, and 28 Feb. 2003, and his inaugural address of 7 March 2003, all available in Czech (the last one also in English) at <www.klaus.cz>, visited 25 May 2006.

⁴⁴ There were some exceptions: his involvement in the governmental crisis at the end of 1997 and the beginning of 1998 and the public support to the invasion to Iraq at the beginning of 2003. In the first case, the two strongest political parties responded by the conclusion of the so-called party-sharing agreement and filing a motion to amend the Constitution with the aim to limit the range of independent activities of the Head of State. The motion to amend the Constitution was approved by the Chamber of Deputies, but rejected by the Senate. Nevertheless, this was a warning for the (and any) President. It showed that certain political parties were willing to solve political and institutional disputes with the President by amendments to the Constitution.

⁴⁵ This difference has been articulated by Klaus himself, who criticized Havel for acting behind the political scene. See, e.g., V. Klaus, 'Václav Havel mýtický i skutečný' [Václav Havel in myths and reality], *MF Dnes*, 31 Jan. 2003, available at <www.klaus.cz>, visited 20 May 2006.

ence of the leftist government and the President from the rightist part of political spectrum.⁴⁶ Interestingly, it seems that this term in the Czech context has been used for the first time a few days after Klaus' election by Pavel Rychetský, then the Social Democratic Minister of Justice and soon-to-be the third Chief Justice of the Czech Constitutional Court (appointed by President Klaus in August 2003).⁴⁷ President Havel has never used this term, typical for French semi-presidentialism, for the very simple reason that he never situated himself within the political spectrum at some specific point.

European Union and foreign policy

Unlike President Havel, who with the exception of the Iraqi crisis in 2003 did not differ in any significant way from foreign policy of Social Democratic governments, President Klaus has profiled himself as a leading national critic of the European Union. In Spring 2003, he called a meeting of the highest constitutional representatives and chairmen of parliamentary political parties with the aim to co-ordinate foreign and European policy.⁴⁸ He spoke critically of the pro-European governmental policy and asked that his opinions be reflected in the country's foreign policy, making reference to the constitutional provision according to which he 'represents the state with respect to other countries'. He allegedly⁴⁹ mentioned the possibility of cancelling the decision of 1993 by which President Havel, in compliance with the Constitution, delegated the power to conclude a large number of international treaties to the government or individual ministers. The decision to withdraw the delegation of power would have created

⁴⁶ The address is available at <www.hrad.cz> (visited 30 May 2006). Critical on this concept L. Zaorálek (Social Democrats), a chairman of the Lower House of the Czech Parliament, who claimed that this term does not fit the Czech system of government which is based on parliamentary democracy. See the discussion program 'Sedmička' [Seven], TV NOVA, 24 April 2005, searchable through <www.nova.cz>, visited 14 April 2006. On the concept of the cohabitation generally J.V. Poulard, 'The French Double Executive and the Experience of Cohabitation', 105 *Political Science Quarterly* (1990) p. 243.

⁴⁷ See the interview with Rychetský for daily *Právo*, 'Klaus je v řadě svých postojů bližší soc. demokracii než ODS' [Klaus is in many of his positions closer to the Social Democratic Party than to CDP], *Právo*, 8 March 2003. Rychetský described the situation after Klaus' election in this way: 'We will simply be in *the situation of the so-called cohabitation, i.e. co-existence of the leftist government and the rightist President*. It was in the opposite way in France during Mitterrand and did not harm it at all.' [emphasis added].

⁴⁸ Basic information on the meeting of 7 May 2003 is available at <www.hrad.cz>, visited 23 May 2006.

⁴⁹ This has never been announced by the President publicly but has been publicized by other participants of that meeting. See T. Menschlik, P. Kolář, 'Klaus plní slib, izolace KSČM končí' [Klaus holds his word, the isolation of the Communist Party is over], *Lidové noviny*, 9 May 2003.

an unparalleled constitutional crisis which is probably why it was not taken in the end.

The meeting in 2003 was perhaps the first proof of Klaus' tendency to view all Presidential powers as personal, as already mentioned above. It is true that the President is authorised to conclude international treaties, however, this power should be viewed through the prism of the parliamentary form of government where the Head of State is not politically responsible to parliament. Moreover, the exercise of this specific power requires a countersignature. This means that the President forms part of a broader network of institutions performing certain tasks: the conclusion and ratification of international treaties fall by no means within his full discretion.⁵⁰

The months after the meeting, in the spring of 2003, saw a number of controversies between the President and the government regarding the country's foreign policy take place when the frequent traveller, publicly active President Klaus presented himself as a critical evaluator of the entire post-Maastricht era of the European integration. His position as Head of State implies that outside the country he is its spokesperson; the foreign policy of the government is nonetheless different. This caused a mixed and perplexed reception of Czech EU policy abroad, because the Czech Republic continued to have a pro-EU government dominated by the Social Democrats. However, the Left-Centrist government went through a crisis in 2004 and 2005 (three Premiers within nine months). Troubled by and forced to resign following a corruption scandal in spring 2005, the pro-EU Premier Gross did not pay much attention to Union or international matters. Thus President Klaus occupied the public arena with his anti-EU rhetoric in 2004 and early 2005 virtually alone.

It was not until April 2005 that a new Premier, Paroubek, started to challenge the President's opinions vigorously. In May 2005 this Social Democratic Premier even threatened to lower the foreign trip budget of the President's office should he continue to act in contradiction with the governmental policy. The President replied very harshly, urging the Premier to 'study the Constitution of the Czech Republic again'.⁵¹

This was preceded by the President's conflict with several members of the European Parliament who had severely criticised his attitudes to the European Constitutional Treaty. Interpreting their critical remarks as contempt of the Head of State, President Klaus addressed the President of the European Parliament and

⁵⁰ Cf., e.g., K. Klíma et al., *Komentář k Ústavě a Listině* [Commentary on the Constitution and the Bill of Rights] (Plzeň, Aleš Čeněk 2005) p. 318 et seq.

⁵¹ See the press statement of the President, as published on 26 May 2005, available at <www.hrad.cz>, visited 19 May 2006.

requested an apology. In his reply, the President of the European Parliament distinguished different roles: the Head of State may enjoy his dignity only outside the frame of political debates, engaging in the debate means that individual players can be criticized; the opposite would be absurd.⁵²

The appointment of judges

In spring 2003, the process of replacement of Constitutional Court justices appointed in summer 1993 began. In 2003 and 2004, the terms of twelve out of fifteen justices appointed by Havel in 1993 and 1994 expired. In this field of personal Presidential powers, a feature from American constitutional law has been transplanted into the Czech constitutional system: the President appoints but the Senate has to consent. Although the President in his pre-election speeches promised extensive consultations, they were held, if at all, secretly. The process of selection of justices is not laid down in Czech law, and neither are the criteria for nomination. In summer 2003, the Senate refused several of the President's candidates, which led to an open controversy: the President called the Senate's reaction 'shocking'.

Subsequently, the President only proposed new individual candidates at intervals of several months, thereby temporarily paralysing the Constitutional Court. According to the President, the Senate was to blame for that, but the Senate obviously did not share this view. At the beginning of 2004, the Senate adopted a resolution asking the President to speed up the process of nominations and to fill the bench so the Court would be able to review the constitutionality of laws again.⁵³ The process of appointing the new constitutional justices lasted almost three years, ending only in December 2005 by the appointment of the fifteenth justice. In total the President submitted 19 nominations (one of the nominees was unsuccessfully proposed twice), 12 gained Senate approval. One of the senators proposed to impeach the President as the President's inactivity seriously threatened the functioning of the Constitutional Court.⁵⁴ Faced with the increasing

⁵² Cf. D.A. Spritzer, 'Klaus: Say no to EU constitution', *Prague Post*, 14 April 2005, available at <www.praguepost.com>. For an interesting analysis in English see M.J. Stransky, 'Whom does Vaclav Klaus serve? When does a president's personal opinion become public policy?', *Prague Post*, 12 May 2005, searchable through <www.praguepost.com> (visited 20 Feb. 2006).

⁵³ Cf. the Senate's resolution No. 390 of 8th of April 2004 and the press statement of the President's Press Secretary as described in D. Macháček, 'Senát vzkázal Klausovi, at' zrychlí hledání soudců' [The Senate urged Klaus to speed up the nomination of justices], *Hospodářské noviny*, 9 April 2004, p. 4.

⁵⁴ The Senator, a protestant preacher and a former dissident Z. Bárta (Christian Democrats). See, e.g., 'Senátor Bárta: Klaus je velezrádce' [Senator Bárta: Klaus has committed high treason], *Právo*, 9 April 2004, p. 1. Bárta was not re-elected into the Senate in autumn 2006 elections.

popularity of the President, however, the idea was rejected even by that Senator's own political party.⁵⁵

In contrast, the nomination of ordinary judges is a shared power of the President. In March 2005, President Klaus refused to appoint a group of 32 ordinary trainee judges, pointing to the fact that they were less than thirty years of age and not personally mature enough. Indeed, an amendment to the Act on Ordinary Courts and Judges⁵⁶ sets the age limit at thirty, but solely in connection with the appointment of future judicial trainees, not for those who were already enrolled in judicial training. Several of the judicial trainees subsequently filed complaints to the Constitutional Court and the Supreme Administrative Court.

The professional association of judges contested the Presidential decision as discrimination based on age and violation of the constitutional provisions on competence according to which the President may not refuse such appointment if all the conditions are satisfied.⁵⁷ The President responded to the reprimand by an open letter to the Chairman of the judicial professional association in which he called the appointment of judges 'a decision-making process, not an automatism'. Similarly, he claimed that shared powers remained within the competence of the President: the only limitation is that their exercise requires validation by the countersignature of the Premier or a member of the government authorised by the latter. According to Klaus, the President thus could freely decide whom to appoint from the list submitted to him by the government.⁵⁸ This example shows how Klaus understands shared powers.

This story has not ended yet: the case of the rejected trainee judges is still pending in the courts. Although the trainees were originally unsuccessful with their complaints before the Municipal Court in Prague, the Supreme Administrative Court quashed the original verdict of the lower administrative court and remanded the case for further proceedings. In two decisions of 27 April 2006 the Supreme Administrative Court rejected the President's claim that administrative courts cannot review the activity of the President within his constitutional do-

⁵⁵ See in detail Z. Kühn & J. Kysela, 'Nomination of Constitutional Justices in Post-Communist Countries: Trial, Error, Conflict in the Czech Republic', 2 *EuConst* (2006) p. 183.

⁵⁶ The Act No. 192/2003 Sb. [*Official Gazette*] and Art. X of this Act which states that the requirement of 30 years does not apply to those trainees who were employed by ordinary courts at the moment when the act came in force.

⁵⁷ Art. 63 Czech Const. states that the President of the Republic appoints judges (1)(e) and makes it a shared power (3) for which exercise the government is responsible.

⁵⁸ The letter of the President of 16 March 2005 is available at <www.hrad.cz>. In it the President also refuses to accept the idea that the exercise of the office of judge is an occupation. In his opinion, it is a constitutional office which cannot be and may not be demanded. The law only stipulates minimum prerequisites for the appointment of judges, however, does not guarantee the appointment as such.

main. It held that if the act of the President has the nature of a decision of an administrative body, the act itself is subject to judicial review, even though the President himself is unaccountable.

The Supreme Administrative Court emphasized that although there have been few cases where the President refused to appoint judges from the list of proposed candidates, they always concerned individuals who did not meet the statutory conditions for appointment as judges.⁵⁹ Against this background, the pending case of judicial trainees seems to be (by rejecting so many candidates by the President) ‘an unprecedented deviation from conventions in appointment of judges in our modern democratic state based on the rule of law’. The Court had to struggle with the problem how to force the unaccountable President to exercise his duty in a lawful manner:

The [administrative] court cannot order the President to decide in a certain way, it can only conclude that the body must issue its decision without delay. [...] Because the administrative court cannot hold the President accountable for his acts but can only review his acts, individual verdicts of the court can be mere moral appeals on the President so his democratic and legal feelings prevail in the exercise of executive power. Despite this, or perhaps because of this, it is not possible to renege the meaning and function of the administrative judiciary which is [*inter alia*] the overall cultivation of the executive power (of which also the President is part) taking into account [the principles of rule of law]; that is why the case must be properly adjudicated and decided by the lower administrative court.⁶⁰

Although the Supreme Administrative Court called for reconciliation, its decision was immediately rebuffed by the Press Secretary of the President (referring to the legal opinion of the legislative section of the Presidential Office). The tone the President and his close collaborators use when commenting on judicial decisions might be surprising for foreign readers; disrespect of judicial decisions by political elites is, however, a widespread phenomenon in post-communist countries. In his statement, the Press Secretary, *inter alia*, stated that the Court’s claim that the President must justify his decision is contrary to the Constitution, which holds that the President ‘appoints judges’. According to the Press Secretary who used a literal and purely mechanical interpretation of the Constitution, this implies that the President may select the candidates entirely at his discretion, and that the President is not bound by any proposal and even that a proposal by the government is not necessary.⁶¹

⁵⁹ Referring to the Havel’s Presidency.

⁶⁰ The judgments of the Supreme Administrative Court of 27 April 2006, sign. 4 Aps 3/2005-35 and 4 Aps 4/2005-42, not yet published, accessible (in Czech) at <www.nssoud.cz>, visited 20 July 2006.

⁶¹ The statement of the Press Secretary of President Klaus, 27 April 2006, is available (in Czech) at <www.hrad.cz>.

It is true that the Minister of Justice's power of nomination is a constitutional tradition not enacted by law – most probably because no one has ever detected any possible problem and the system functioned smoothly. However, in view of the expansive reading of the constitutional powers of the President by the President's Office, the only limit to this sort of unrestrained discretion would be the ultimate requirement of a countersignature, which would exclude those President's choices the government would not agree with.

The case of the trainee judges provoked a public debate over the limits of Presidential powers. The debate compared the exercise of shared powers by an unanswerable, indirectly elected Head of State to the work of a 'notary public', i.e., that it is his task to give prestige to the act of appointment. According to an important Czech constitutionalist of the interwar period, an unanswerable Head of State in principle may not oppose the proposal of the countersigning ministers; in the process of the creation of an act, the will of the responsible actor is decisive.⁶² The former constitutional justice and prominent Czech constitutionalist, Professor Klokočka, also harshly criticized President Klaus.⁶³ In his opinion, the President seriously and systematically overstepped his constitutional powers and interfered with the powers of the government and the judiciary. Klokočka criticized the President's disrespect of gradually developed constitutional conventions as well as the fact that the political establishment, including the President, does not really understand the meaning of the political institutions and traditions imported from the West after 1989. In this view, the written constitution must be interpreted by taking into account basic principles of the system of government and the fact that the President represents the country but is not accountable for his acts. The director of the legal department of the President's office retorted that the President defended his country against a 'government of judges'. Shared powers do not deprive the President of his authorship of the acts made within these powers; the President does not have to consult anyone before he proposes his decision to the government.⁶⁴

Resignation of Ministers and appointment of Premier

Another example of the extension of presidential powers regards Article 62(a) of the Czech Constitution on the personal power of the President to accept the resignation of ministers. Although, admittedly, the President does have some discre-

⁶² J. Krejčí, *Problém právního postavení hlavy státu v demokracii* [Problems Connected with the Legal Status of the Head of State in Democracy] (Prague, 1935) p. 56 and p. 68.

⁶³ V. Klokočka, 'Ústava a Klausův sklon vládnout' [The Constitution and Klaus' tendency to rule], *Právo*, 27 April 2006, p. 8.

⁶⁴ J. Bárta, 'Profesor Klokočka prosazuje soudcokracií' [Professor Klokočka pushes the government of judges], *Právo*, 4 May 2006, p. 8, available also at <www.klaus.cz>.

tion in this field, the Presidential acceptance of the resignation of ministers who themselves want to resign and whose resignation the Premier has accepted should not be dependent on the fulfilment of the President's own political demands. During the governmental crisis in spring 2005, this proved otherwise.

At the end of March 2005, Christian Democratic ministers resigned in reaction to the protracted scandal involving Premier Gross (Social Democrats), who was unable to explain the circumstances regarding financial transactions relating to his apartment. The Premier recommended accepting the resignations and proposed names of successors from the ranks of his own political party. The President, however, ignored the resignations stating they were no solution to the problem and would only lead to the creation of a minority government. At the same time, the President presented a series of conditions, one of which was as a public promise of the Premier that he would ask Parliament for a vote of confidence. This would require the Premier to solicit the open support of the Czech Communist Party, which would harm his Social Democratic Party. Although the crisis finally ended by the restoration of the old coalition, the weak Premier was unable to defend his powers against the obtrusive President.

This shows that the President can further expand his portion of power within the constitutional system without a strong Premier. President Klaus apparently wanted to prevent the opposition Communist Party from gaining greater influence on political matters. It is, however, debatable whether this end justifies the means. The President prevented the Premier from ruling because the Premier was unable to change his own government.

These are clear examples that a strong activist personality performing the role of the Head of State may overshadow the Premier and assert himself by speaking in public (moralist, tribune of the people) or by personal demands (in particular concerning ministers, ambassadors and judges).⁶⁵ In the next phase, substantial concessions regarding the direction and contents of policy may follow, as was the case in Weimar Germany and Finland in the past.

Legislative veto

Václav Klaus used to be one of the most eloquent critics of President Havel's legislative vetoes. Let us recall that the exercise of this power does not require a countersignature and is thus within the pure discretion of the President.⁶⁶ During

⁶⁵ It is comparable to 1998 when President Havel expressed his reservations to the candidate for the post of foreign minister. Premier Zeman, however, insisted on his choice. The President could not risk blocking the appointment of the cabinet owing to such personal controversy and had to make a concession.

⁶⁶ Art. 62(h) and Art. 50 Czech Const. For the genesis of this institution *see* the text accompanying n. 32 *supra*.

Klaus' candidacy for the Presidential office in early 2003, he declared that the President's involvement in legislative process must be 'exceptional'.⁶⁷ Actual practice during the Klaus Presidency soon proved to be different. Between March 2003 and November 2006 he has already used the veto in 27 cases. For comparison: Havel vetoed 27 acts during the entire ten years of his Presidency. In order to override a veto the Lower House of the Parliament must reaffirm the bill by a majority of all deputies (101 of the 200 members).⁶⁸ In case of small coalitions (like the one which existed between 2002 and 2006, which had a bare majority of 101 votes in the Lower House), frequent Presidential vetoes put enormous pressure on the coalition and the discipline of its deputies.

If we compare the nature of the laws returned by President Klaus to the Chamber of Deputies, we see an important difference with the practice of President Havel. While the latter used to return bills based on presumed constitutional deficiencies (the lustration law is the most famous example),⁶⁹ the vetoes of President Klaus are clearly based on ideological arguments. The laws vetoed by him concern laws implementing European law (the European Arrest Warrant is but one example), liberal policies (the 2006 Act on the Registered Partnership) as well as leftist laws, pushed through by the Social Democratic Government, which do not fit the President's Thatcheristic conservative agenda (a new 2006 Labour Code, to name just one example).⁷⁰ President Klaus thus effectively serves as a third branch of the legislature.

Last but not least, the non-signing and simultaneous non-vetoing of bills is yet another example of the expansion of Presidential powers which seems to be at odds with the possibilities reserved to the Czech Presidency by the text of the Constitution and established doctrine. The Czech Constitution says that the President either returns a bill to Parliament (legislative veto) or signs it.⁷¹ However, on two occasions President Klaus neither returned an approved bill to the Chamber of Deputies, nor signed it. It may be said, with exaggeration, that President Klaus uses all means not explicitly forbidden to him by the text of the Constitution and thus forces constitutionalists to contemplate various links between constitutional bodies, which are scarcely thought of when everything runs the usual way.

⁶⁷ V. Klaus, the first round of Presidential elections, 15 Jan. 2003, available in Czech at <www.klaus.cz>, visited 22 May 2006.

⁶⁸ Art. 50(2) Czech Const.

⁶⁹ The list of vetoes by President Havel is provided in B. Chrástilová, P. Mikeš, *Prezident republiky Václav Havel a jeho vliv na československý a český právní řád* (Praha, ASPI 2003).

⁷⁰ The vetoes of President Klaus are listed at <www.hrad.cz>.

⁷¹ See Art. 50 and Art. 51 Czech Const.

CONCLUSIONS

Do the extent and level of Presidential elements intertwined with the Czech constitutional system make it semi-presidential? According to Sartori's criteria, the answer tends to be negative: the President is neither elected directly nor appointed by a special committee created for this purpose and therefore the Parliament is the only fully democratically elected body.⁷² The sharing of executive power by the President and the Premier is more evident even though the President's share is limited to a narrow – though important – area of powers, mainly concerning nominations and appointment to various offices. The government is not supposed to implement the President's will. The focus of Presidential will is the moderation of the constitutional system rather than the implementation of a political programme. This is supported by the non-responsible character of the office of the President, which is incongruous with real political power. Furthermore, the system of dissolution of the Chamber of Deputies prevents the President from performing efficiently as an arbiter in disputes between the executive and legislative branches. Unlike other semi-presidential systems and also in many parliamentary systems (e.g., Hungary or Slovakia),⁷³ the constitutional system does not give the President any specific powers in states of emergency. The President's role of the supreme commander of military forces is essentially ceremonial.

In our opinion, the high status of the President does not change the fact that the Czech Republic is a parliamentary republic. It is, however, true that the President potentially performs much more than just a ceremonial role. Whether this potential is used or not depends on the character and temperament of the President (just as in Finland under the rule of President Kekkonen).⁷⁴ The political context is important too. A weak Premier, a politically fragmented Chamber of Deputies, the existence of an important pro-presidential political party and the President's credibility in the eyes of the public – broaden the President's room for manoeuvring. On the other hand, a strong Premier supported by a coherent parliamentary majority may politically marginalize the President. Therefore the validity of Duverger's theory that the real role and constitutional status of the Head of State depends on many variables should not be limited to semi-presidential systems.⁷⁵

⁷² G. Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* (Basingstoke, Macmillan 1994).

⁷³ See J. Kysela, 'Nad jedním z "bezpečnostních aspektů" ústavního pořádku ČR: k výkladu a aplikaci čl. 43 Ústavy' [On one of "security aspects" of the Czech constitutional order: interpretation of article 43 of the Constitution], *Časopis pro právní vědu a praxi* (2003), p. 89-107.

⁷⁴ See, e.g., J. Nousiainen, 'From Semi-presidentialism to Parliamentary Government: Political and Constitutional Developments in Finland', *24 Scandinavian Political Studies* (2001) p. 95.

⁷⁵ Cited from von Beyme, *supra* n. 14, p. 54-55.

If the President would be elected directly, as has been proposed, the Czech Republic would almost certainly move towards a semi-presidential system. It is highly probable that a President thus elected would use all power to force the other constitutional bodies to consider his/her political preferences. However, the current President aspires to a similar position without a mandate given by direct election. What would happen if President Klaus would have to share executive power with a government of his own political party (i.e., the Civic Democrats, CDP)? If in that case he would use his influence as a founder of the party to influence the political choices of the CDP Premier and his government, we would also witness the establishment of a semi-presidential system, be it a *sui generis* one.

For the time being, however, we will refer to the Czech government as a parliamentary system *sui generis*, in particular as regards the status of the Head of State,⁷⁶ or in other words: parliamentarianism with a relatively influential President.⁷⁷ A comparison to constitutional and political systems abroad shows that such variations are not uncommon.⁷⁸



⁷⁶ K. Klíma, 'Výkonná moc v parlamentním systému ČR (aneb nakolik je forma vlády v ČR ještě parlamentní)?' [Executive Power in the Czech Parliamentary System (Does the CR Still Have a Parliamentary Form of Government?)], in V. Hloušek and V. Šimíček (eds.), *Výkonná moc v ústavním systému České republiky* [Executive Power in the Constitutional System of the Czech Republic] (Brno, International Institute of Political Science 2005) p. 44.

⁷⁷ K. Vodička, L. Cabada, *Politický systém České republiky. Historie a současnost* [Political System of the Czech Republic. History and Presence] (Prague, Portál 2003) p. 154.

⁷⁸ R.L. Maddex places the Czech Republic, together with Portugal, in the category of 'presidential-style parliamentary systems'. See Maddex, *supra* n. 36, p. 59.